Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARCIA ANN CROMLEY,

Petitioner,

v.

BOARD OF EDUCATION OF LOCKPORT TOWNSHIP HIGH SCHOOL DISTRICT 205, DONALD E. WEBER, RICHARD J. DITTLE, AND DONALD MEINTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When, after two years of litigation, the plaintiff's lawyer accepts a partnership in the seven partner lawfirm representing the defendants, may a federal district court, consistent with the integrity of the judicial process and public confidence in the legal profession, permit the law firm to continue to represent the defendants on representations that the new partner will be shielded from involvement in the case?

2. Does a party seeking summary judgment have the burden of providing the district court with the evidentiary material which it believes demonstrate the absence of a genuine issue of material fact?

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No. 93-____

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Petitioner Marcia Ann Cromley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 3, 1994.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-17) is reported at 17 F.3d 1059. The opinions of the district court (App. 19-48, App. 49, App. 50-58) are reported at 699 F.Supp. 1283 (N.D.Ill. 1988), 1990 WL 37198 (N.D. Ill. 1990), and 1993 WL 5394 (N.D.Ill. 1993).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 18) was entered on March 3, 1994.

STATEMENT

From 1978 to 1987, petitioner was the Reading Department chairperson and the "Chapter I Coordinator" at defendant school district. (Pet.App. 2.) In February of 1987, plaintiff informed the Illinois Department of Children and Family Services that two students at the school had complained to her of sexual misconduct by another teacher. (Pet.App. 2.)

On March 27, 1987, petitioner's position as chairperson of the reading department was abolished when the department was merged with the English department; thereafter, petitioner was not reappointed to the position of "Chapter I Coordinator." (Pet.App. 2-3.) Plaintiff was also passed over in filling several other vacant, supervisory positions. (Pet.App. 3.)

In November of 1987, petitioner brought this action under 42 U.S.C. §1983, alleging that her position as chairperson had been abolished in retaliation for her having complained about sexual misconduct. (Pet.App. 3.) Petitioner was represented by attorney Laurence L. Weiner. (Id.)

Respondents, represented by a partner in the firm of Scariano, Kula, Ellch & Himes, Chtd., moved to dismiss; in a memorandum opinion filed on November 1, 1988 (Pet.Appendix 19-48), the district judge permitted the core allegations of plaintiff's claims to proceed.

In early October of 1989, Weiner began to negotiate a partnership with the Scariano firm. Petitioner's attorney accepted a partnership with respondents' law firm on November 8, 1992. (Pet.App. 3.) On November 29, 1989,

the district judge permitted petitioner's counsel to withdraw.

After petitioner's attorney had changed sides, petitioner moved to disqualify the Scariano firm from continuing to represent the respondents. The Scariano firm responded with a memorandum and an affidavit (Pet.App. 59-65) describing the screening procedures that the Scariano firm had adopted on December 15, 1989. The district judge denied the motion to disqualify in a brief memorandum opinion dated March 19, 1990. (Pet.App. 49.)

After the case was ready for trial, respondents filed a motion for summary judgment. (Record Item No. 92.) Although defendants' motion referred to deposition excerpts, respondents did not file the depositions, instead supporting their motion with a single affidavit. (Record Item No. 93.) Plaintiff objected to many of respondents' claimed "uncontested facts" and the parties disagreed about what had been said at depositions. The district court granted summary judgment on the rationale that a trier of fact could not "reasonably conclude that but for the single call to DCFS, the merger decision would not have been made or that plaintiff would have been selected as English Department Chairperson or associate chairperson." (Pet.App. 57.)

Petitioner renewed her disqualification argument on appeal, urging the Seventh Circuit to adopt a *per se* rule of disqualification when, after two years of litigation, the plaintiff's attorney changes sides and becomes one of seven partners in the small law firm representing the defendants. The Court of Appeals, relying on its precedents upholding screening walls, concluded that disqualification of respondents' law firm had not been required. (Pet.App. 8-11.) The Court of Appeals rejected as "untenable" petitioner's argument that Rule 56 required the proponent of a motion for summary judgment to submit copies of depositions when there is a dispute about what had been said at the deposition (Pet.App. 11 n.4), and held that summary judgment had been

properly granted. (Pet.App. 12-17.)

REASONS FOR GRANTING THE WRIT

–I–

This case raises important questions involving the integrity of the judicial process and public confidence in the legal profession. At issue in this case is the applicability of a so called "Chinese Wall"[1] to a situation where, after two years of litigation, the plaintiff's attorney changes sides and becomes one of seven partners in the small law firm representing the defendants.

If this case had arisen in any of the numerous jurisdictions that have adopted the American Bar Association Model Rules of Professional Conduct, respondents' law firm would not have been permitted to choose between representing the plaintiff or the defendants after plaintiff's lawyer became a partner in the defendants' law form. As approved by the American Bar Association, Rule 1.10(b) of the Model Rules rejects "'any thought that the "taint" of the incoming lawyer can be cured by screening him or her out of the affected client's matter.'"[2] *Parker v. Volkswagenwerk*

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1. The term "Chinese Wall" has been criticized as "linguistic discrimination." *Peat, Marwick, Mitchell & Co v. Superior Court,* 200 Cal.App.3d 272, 293-94, 245 Cal.Rptr. 873, 887 (1988) (noting, *inter alia,* that "[t]he Great Wall of China on the other hand, was only a one-way. It was built to keep outsiders out—not to keep insiders in.")

2. Rule 1.10(b) of the Model Rules provides as follows:

> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are

Aktiengesellschaft, 245 Kan. 580, 589, 781 P.2d 1099, 1106 (1989), quoting 1 Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct,* Rule 1.10, p. 191 (1988 Supp.) Under the Model Rules, the law firm would not have been permitted to choose between clients, but would have been compelled to withdraw from the litigation. See, e.g., *Picker International, Inc. v. Varian Associates, Inc.,* 869 F.2d 578, 593 (Fed.Cir. 1989); *Penn Mutual Life Insurance Company v. Cleveland Mall Associates,* 841 F.Supp. 815, 818 (E.D.Tenn. 1993).

The Seventh Circuit is the leading proponent of the minority view that screening walls permit a lawyer in private practice[3] to change sides in the middle of litigation. Starting with *Novo Terapeutisk, Etc. v. Baxter Travenol Lab.,* 607 F.2d 186 (7th Cir. 1979), and culminating in the present case, the Seventh Circuit has permitted the presumption of shared confidences among members of a law firm to be rebutted by a variety of "screening devices." See, e.g., *Schiessle v. Stephens,* 717 F.2d 417 (7th Cir. 1983) (attorney moving from one large law firm to another). A similar rule has been adopted by the Sixth Circuit. *Manning v. Waring, Cox, James, Sklar and Allen,* 849 F.2d 222, 225 (6th Cir. 1988).

The "screening device" approved by the Seventh Circuit in this case consisted of little more than an "admonishment" to each member of respondents' law firm not to discuss the

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materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

3. Screening rules are recognized in the Model Rules of Professional Conduct (Rule 1.11(a)) when a lawyer leaves public service.

case with petitioner's former attorney. (Pet.App. 63-65.) A violation of this admonishment "could leave to consideration of discipline by the [firm's] executive committee." (Pet.App. 65.) The "screening device" did not contain any provision to bar petitioner's former attorney from sharing in the fees paid to the law firm by respondents.[4] The "screening device" approved by the Seventh Circuit in this case is, in the words of Professor Wolfram, "little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens." Wolfram, *Modern Legal Ethics*, p. 402 (1986).

Other courts have acknowledged the inadequacy of the "screening device" approved by the Court of Appeals in this case. "Resort to affidavits stating that 'I didn't look at the file' or asserting the existence of Chinese walls are of little consolation to that client and do little or nothing to erase the appearance of impropriety." *Nebraska ex rel. Firstier Bank*, 244 Neb. 36, 45, 503 N.W.2d 838, 844 (1993). The majority view is that a "cone of silence" is simply not enough to "safeguard against inadvertent disclosures" among members of a small lawfirm. *Baird v. Hilton Hotel Corporation*, 771 F.Supp. 24, 27 (E.D.N.Y. 1991) See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1057 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981), *opinion following remand*, 713 F.2d 886, 891 (2d Cir. 1983), *vacated on other grounds*, 472 U.S. 1023 (1985); *Occidental Chemical Corporation v. Nueces County*, (Texas Court of Appeals, May 26, 1994), 1994 WL 209482 *2, *Smart Industries Corp v. Superior Court*, (Arizona Court of Appeals, April 7, 1994), 1994 WL 113385 *10 (explicitly rejecting Seventh Circuit's view);

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4. The contrary statement of the Seventh Circuit (Pet.App. 9) is unsupported by the record.

This Court should exercise its supervisory powers to prevent the clear perception of impropriety when, after two years of litigation, the plaintiff's lawyer jumps ship to become a parter in the small lawfirm representing the defendants.

-II-

The decision of the Seventh Circuit in this case is flatly at odds with the rule set out by this Court in *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp v. Catrett*, 477 U.S. at 323 (1986).

Respondents relied on page references to depositions in their motion for summary judgment. Petitioner disagreed with many of the inferences that respondents were drawing from the deposition testimony.[5] Respondents did not, however, file any of the depositions.

In the view of the Seventh Circuit, the party seeking summary judgment is not required to submit evidentiary material to support the motion. (Pet.App. 11 n.4.) The plain language of Rule 56 is to the contrary.

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5. The disputes about the contents of depositions are set out in Plaintiff's Response to Defendants' "Statement of Uncontested Facts," filed as an exhibit to Record Item No. 101, paragraphs 2.04, 3.02, 3.05, 5.225, 5.25, 5.29, 5.35, 6.04, 6.06.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 1994

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